

ST 01-34
Tax Type: Sales Tax
Issue: Machinery & Equipment Exemption – Manufacturing

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
SPRINGFIELD, ILLINOIS

THE DEPARTMENT OF REVENUE)	Docket #	99-ST-0000
OF THE STATE OF ILLINOIS)	IBT #	0000-0000
)	NTL #	000000000000
v.)		
)		
ABC CONCRETE, INC.)	Barbara S. Rowe	
Taxpayer)	Administrative Law Judge	

RECOMMENDATION FOR DISPOSITION

Appearances: Mr. Stephen R. Wigginton, of Becker, Paulson, & Hoerner, P.C. for ABC CONCRETE, Inc.; Mr. James Day and Mr. Kent R. Steinkamp, Special Assistant Attorneys General for the Illinois Department of Revenue.

Synopsis:

This matter comes on for hearing pursuant to ABC CONCRETE Corporation's (hereinafter referred to as the "Taxpayer") timely protest of Notice of Tax Liability No. 00 0000000000000000 for the period of May 1996 through June 30, 1998. The taxpayer's position is that the front-end loaders and related parts at issue are used in the manufacturing process and therefore are exempt from Use Tax. The sole issue is, therefore, whether the taxpayer, a ready-mix concrete manufacturer, is entitled to the Manufacturing Machinery and Equipment (hereinafter referred to as the "M & E") exemption of the Use Tax Act for certain front-end loaders and their related parts. After a through review of the record and exhibits presented, it is recommended that the liability in question be dismissed. In support thereof, I make the following findings and conclusions in accordance with the requirements of Section 100/10-50 of the Administrative Procedure Act (5 ILCS 100/10-50).

FINDINGS OF FACT:

1. The *prima facie* case of the Department was established by the admission into evidence of

Notice of Tax Liability 00 0000000000000000 issued by the Department on June 2, 1999, for tax and interest in the amount of \$96,197.00. The taxpayer made a payment of \$30,784.00 thereby reducing the liability to \$65,413.00. (Department's Ex. No. 1; Tr. p. 10)

2. The taxpayer operates five (5) ready-mix plants throughout Illinois. Taxpayer manufactures ready-mix concrete for sale to end-users for construction. (Tr. p. 32)

3. Ready-mix concrete is prepared pursuant to a mix design. The component parts of ready-mix concrete are water, sand, cement, rock or gravel, and special chemicals and/or add mixture, if necessary. (Tr. p. 41)

4. These ingredients for each job are not necessarily used in the same ratio. Factors such as weather conditions and the specific use of the concrete are key to determining the amount of each ingredient necessary for a particular job. (Tr. pp. 42-44)

5. The sand and rock are delivered to the taxpayer by dump trucks. They are stockpiled at the plant. A pneumatic tanker delivers the cement and blows it into the taxpayer's overhead silos. (Tr. pp. 33-34)

6. The front-end loaders¹ at issue do not unload the sand and rock from the dump trucks. (Tr. p. 34)

7. The batch plant serves the function of combining the four major component parts, water, sand, cement, and rock/gravel, in specific proportions and loads that mixture into the drum mixer of the ready-mix concrete truck. (Taxpayer Ex. Nos. 4, 5 & 6; Tr. pp. 54-56)

8. The front-end loaders scoop up the stockpiled raw materials and place the material into the waiting hopper, which takes the material into the overhead bins of the batch plant. The front-end loaders are used 85-90% of the time to scoop up the stockpiled raw material and place it in the waiting hopper. (Taxpayer's Ex. Nos. 1 & 2; Tr. pp. 34, 56)

9. A conveyor carries the material loaded in the hopper to the inside bins of the batch plant. (Tr. pp. 35-36)

10. The conveyor is on a control trolley that can move materials laterally into the four

¹ The testimony referred to the terms "wheel loaders," "front loaders," and "end loaders" for the front-end loaders.

separated overhead bins. The four overhead bins consist of two rock bins and two sand bins. (Taxpayer. Ex. No. 3; Tr. p. 36)

11. Inside the plant and at the bottom of the overhead bins is the weigh hopper. The weigh hopper actually weighs the sand and rock/gravel, known as the "aggregate" and accumulates the weight of the two products. (Tr. p. 38)

12. A mix design is developed for the specifics of each job. The mix design is entered into the computer used by the batch plant operator. (Taxpayer's Ex. No. 4; Tr. pp. 42-43)

13. The batch plant operator determines the amounts of aggregate needed that becomes the accumulated weight on the weigh hopper. (Taxpayer's Ex. No. 4; Tr. p. 38)

14. The weigh hopper then goes up another conveyor and the aggregate is deposited in the back of the concrete mixing truck. The dry cement is dropped into the concrete mixing truck out of the silo where it is stored. (Taxpayer's Ex. Nos. 5 & 6; Tr. pp. 38-40)

15. The cement silo is completely detached from the building that houses the overhead bins, weigh hopper, and conveyors. The cement silo has its own weigh hopper. The components of the aggregate are weighed together. The cement is weighed separately. (Tr. p. 40)

16. The aggregate and cement are discharged into the back of the concrete mixing truck. Water and any additional chemicals needed are added and the concrete mixing truck combines the materials. (Tr. pp. 41-42)

17. The only issue in dispute is the taxability of the front-end loaders and related parts. The tax on all other items has been paid. (Tr. pp. 20-21)

Conclusions of Law:

The Department prepared corrected returns for Use Tax liability pursuant to section 4 of the Retailers' Occupation Tax Act (35 ILCS 120/4). Said section is incorporated by reference in the Use Tax Act at 35 ILCS 105/12.

The taxpayer is challenging the assessment of Use Tax and interest on the purchase of front-end loaders and their related parts. The taxpayer asserts that the purchases are exempt from Use Tax based

upon the Manufacturing Machinery and Equipment exemption as set forth in section 3-5 of the Use Tax Act. That section states:

§3-5. Exemptions. Use of the following tangible personal property is exempt from the tax imposed by this act: * * * (18) Manufacturing and assembling machinery and equipment used primarily in the process of manufacturing or assembling tangible personal property for wholesale or retail sale or lease, whether that sale or lease is made directly by the manufacturer or by some other person, whether the materials used in the process are owned by the manufacturer or some other person, or whether that sale or lease is made apart from or as an incident to the seller's engaging in the service occupation of producing machines, tools, dies, jigs, patterns, gauges, or other similar items of no commercial value on special order for a particular purchaser. 35
ILCS 105/3-5

The statute further provides:

§3-50. Manufacturing and assembly exception. The manufacturing and assembling machinery and equipment exemption includes machinery and equipment that replaces machinery and equipment in an existing manufacturing facility as well as machinery and equipment that are for use in an expanded or new manufacturing facility. 35
ILCS 105/3-50.

Section 3-50 of the statute defines equipment as "[a]n independent device or tool that is separate from any machinery but that is essential to an integrated manufacturing or assembling process; . . ." 35
ILCS 105/3-50; see also 86 Ill. Admin. Code §130.330(c)(3). The Department's regulation provides that "[t]he fact that particular machinery or equipment may be considered essential to the conduct of the business of manufacturing or assembling because its use is required by law or practical necessity does not, of itself, mean that machinery or equipment is used primarily in manufacturing or assembly." 86 Ill. Admin. Code §130.330(d)(2). Thus, the taxpayer must not only show that a piece of equipment is essential to the manufacturing process, it must prove that it is primarily used in this process.

In Van's Material Company, Inc. v Department of Revenue, 131 Ill.2d 196 (1989) (hereinafter referred to as "Van's Material"), the Illinois Supreme Court identified three distinct words or phrases which form the "gist" of the statute: (1) "tangible personal property"; (2) process of the manufacturing or assembling"; and (3) "primary". *Id.* at 203. In the same opinion, the court acknowledged that the legislature enacted the M & E exemption to give a tax exemption on capital investment, thereby attracting new manufacturing facilities to Illinois while at the same time maintaining existing facilities within the

state. Chicago Tribune Co. v. Johnson, 106 Ill.2d 63, 72 (1985); Van's Material, at 215.

It is undisputed that the taxpayer manufactures ready-mix concrete for sale to retail customers and private contractors, thus it is similarly situated to the taxpayer in Van's Material. In that opinion, the Illinois Supreme Court held that ready mix concrete constitutes tangible personal property. (*Id.* at 203)

The taxpayer maintains that the use of the front-end loaders to charge the bin is an essential and necessary part of the manufacturing process and accordingly the purchase of the equipment is exempt from Use Tax.

The statute defines manufacturing process in the following manner:

'[M]anufacturing process' shall mean the production of any article of tangible personal property, whether such article is a finished product or an article for use in the process of manufacturing or assembling a different article of tangible personal property, by procedures commonly regarded as manufacturing, processing, fabricating, or refining which changes some existing material or materials into a material with a different form, use or name. 35 ILCS 105/3-50.

In Van's Material, the Court determined that "whenever labor is bestowed upon an article which results in its assuming a new form, possessing new qualities or new combinations, the process of manufacturing has taken place." Van's Material, at 208 quoting Dolese & Shephard Co. v. O'Connel, 257 Ill. 43, 45 (1912). The statute specifies that "[t]he manufacturing process commences with the first operation or stage of production in the series and does not end until the completion of the final product in the last operation or stage of production in the series." 35 ILCS 105/3-50(1). Accordingly, a determination of the taxability of the taxpayer's use of its front end-loaders turns on whether charging the bin by the front-end loader constitutes the first operation in the series of operations that collectively comprise the manufacturing of concrete.

In this case we re-visit the issue of whether the front-end loaders were primarily used in the process of manufacturing or assembling. The Department again disputes that the front-end loader is used in the manufacturing process and takes issue with several elements of the nearly identical opinions issued in Department of Revenue v. Gumbo's Ready-Mix Co.² and Department of Revenue v. Hard as a Rock, Inc.³. The Department contends that the term "charging" has been improperly expanded in Gumbo's Ready Mix

² Released as ST 99-4

³ Released as ST 99-6

and Hard as a Rock, Inc. to include the use of the front end-loader as the beginning of the manufacturing process by loading the bins of the concrete manufacturing plant, [otherwise known in the industry as a batch plant] with the aggregate used to manufacture concrete. Just as in Hard as a Rock and Gumbo's Ready-Mix, the Department continues to argue that loading the holding bins is a pre-production activity and therefore the purchase of the equipment to accomplish that task is outside the scope of the M & E exemption.

The representatives of the Department raised the identical contention in Gumbo's Ready-Mix and Hard as a Rock, Inc. to no avail. In its argument herein, while admitting that the facts in this case are virtually identical to the facts in Gumbo's Ready Mix, counsel for the Department offers no additional evidence or facts to support its argument, states that the prior decisions conflict with the outcome required by law (Department's Brief p. 5), and offers no statutory or case law authority to support this contention.

The administrative law judge in Gumbo's Ready Mix determined that the charging process includes the front-end loaders loading the materials into the bins to begin the process of manufacturing concrete. Although pre-production activity is a taxable use under the Department's regulations, 86 Admin Code ch. I, Sec. 130.330(d)(4), the final decisions in Hard as a Rock and Gumbo's Ready Mix held that charging the bins of the concrete batch plant is not pre-production but rather involves the first step in the series of operations that constitute the manufacture of concrete. I agree.

For the reasons stated above, it is recommended that the portion of Notice of Tax Liability 0000000000000000 attributable to the purchases of front-end loaders and the related repair parts be cancelled.

Respectfully Submitted:

November 5, 2001

Barbara S. Rowe
Administrative Law Judge